UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DONALD H. DOW,		
Plaintiff	)	
v.	)	***Civil No. 90-0301 B***
LOUIS W. SULLIVAN, M.D., Secretary, United States Department of Health & Human Services,	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

This Social Security Supplemental Security Income appeal raises the issues whether substantial evidence supports the Secretary's Step 3 finding that the plaintiff's impairment from alcoholism does not meet or equal any impairments in the Listing of Impairments (``Listings") and whether the hypothetical questions posed to the vocational expert at Step 5 were an accurate reflection of evidence in the record.

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[1] This action is properly brought under 42 U.S.C. ' 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 24, 1991 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since May 15, 1989, Finding 1, Record p. 11; that he ``has emotional problems, chronic obstructive pulmonary disease, and a back impairment, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix I, Subpart P, Regulations No. 4," Finding 2, Record p. 11; that he cannot perform his past relevant work but is capable of performing other work available in the national economy, Finding 3, Record p. 11; and that he was not disabled at any time through March 13, 1990, the date of the Administrative Law Judge's decision, Finding 4, Record p. 12. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision of the Secretary. 20 C.F.R. ' 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

In reviewing the Secretary's decision, the standard is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff argues that the Secretary failed to properly evaluate his disability from alcoholism. Under the proper analysis, he argues, his impairment from alcoholism meets the Listings at 12.08 for Personality Disorders. The Secretary asserts that there is no evidence of impairment due to chronic alcoholism and, therefore, the plaintiff does not meet any of the impairments in the Listings.

Social Security Ruling 82-60 sets forth guidelines for evaluating disability claims where alcoholism is present:

> Drug addicts or alcoholics cannot be considered ``disabled" on the basis of that diagnosis alone . . . . Drug addiction and alcoholism are diagnostic terms; they do not denote impairment value or severity. It is necessary to evaluate the severity of the impairment which may be associated with, manifested by, result from, or coexist with these diagnoses.
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> . . .
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> The medical evidence is then evaluated to determine whether the individual's impairment, or impairments in combination, is of a level of severity and of expected duration to meet, or to be medically equivalent to, the Listing of Impairments. If any of these medial evaluation criteria are met or equaled, the individual is found to be disabled. If they are not, and the individual has a severe impairment, the impact of the impairment on his or her ability to work must be considered in terms of vocational factors such as age, education and prior work experience. . . .

Id., reprinted in *West's Social Security Reporting Service* at 790-92 (1983).

In accordance with the Ruling, the Secretary's regulations provide, in relevant part, that,

> [i]f you have a condition diagnosed as addiction to alcohol or drugs, this will not, by itself, be a basis for determining whether you are, or are not, disabled. As with any other medical condition, we will decide whether you are disabled based on symptoms, signs, and laboratory findings.

20 C.F.R. ' 416.925(e). The listing for alcoholism and other substance addiction disorders, found at ' 12.09, requires analysis of severity by reference to other appropriate Listings. The plaintiff argues that his addiction to alcohol results in a behavioral disorder that satisfies the Listings at ' 12.08 for personality disorders. This listing states, in part, that

> [a] personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress.

The required level of severity for personality disorders is met when certain criteria are satisfied, as set forth in ' 12.08, paragraphs A and B.

The plaintiff has the burden of proving that his impairment or combined impairments meet or equal a listed impairment. *Dudley v. Secretary of Health & Human Services*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the plaintiff must have the specific medical findings, which consist of symptoms, signs and laboratory findings, shown in the listing for that impairment. 20 C.F.R. '' 416.925(d), 416.928. To determine whether an impairment equals a listed impairment, the Secretary will ``compare the symptoms, signs, and laboratory findings about [the] impairment(s), as shown in the medical evidence . . ., with the medical criteria shown with the listed impairment." 20 C.F.R. ' 416.926(a).

The Court of Appeals for the First Circuit provides guidance for evaluating disability claims based on alcoholism in *Arroyo v. Secretary of Health & Human Servs.*, 932 F.2d 82 (1st Cir. 1991). In reference to the Secretary's regulations, the court states that

> [d]isability by reason of alcoholism today may be shown by establishing that the addiction to alcohol has resulted in behavioral or physical changes which satisfy any of the nine enumerated impairment listings under [the Listings at ' 12.09].

Id. at 87. The court then notes that, ``where a claimant's condition does not meet or equal this listing, the question arises as to whether alcoholism nonetheless can be disabling." *Id.* The court continues its analysis by noting that,

> even though alcoholism, by definition, imports a certain lack of control, evidence that a claimant has been diagnosed a chronic alcoholic is *not* sufficient to establish that the claimant has lost the ability to control his consumption of alcohol. . . . And we reiterate that a diagnosis of alcoholism will not establish disability unless there is a resulting functional loss that prevents a claimant from performing substantial gainful activity for a continuous period of at least twelve months.

Id. at 87-88 (citations omitted) (emphasis in original).

The First Circuit's discussion touches on the precise issue on appeal in this case. In order for the Secretary to determine whether the plaintiff is disabled from alcoholism, he must first determine whether his impairment meets or equals the Listings. If the impairment does not meet the Listings, the Secretary must then determine whether the plaintiff, though alcoholic, is able to work. The plaintiff asserts that this record supports a finding that his impairment from alcoholism satisfies the Listings at ' 12.08 and that the Administrative Law Judge erred in finding to the contrary. The Administrative Law Judge acknowledged that the plaintiff has personality and substance addiction disorders but found that neither meets the Listings. His decision, however, does not reveal the basis upon which he came to the findings in the Psychiatric Review Technique Form (``PRTF") appended to his decision, particularly in rating the severity of impairment under part IV. *See* Record p. 13. The record contains no other PRTFs from either examining or nonexamining physicians. The only statement the Administrative Law Judge made regarding his analysis of the plaintiff's impairment from alcoholism is that

> [t]here is no continuous reference to alcoholism throughout the medical evidence. The claimant's intellectual capacity, although in the low range would certainly not interfere with his ability to perform unskilled work. He testified that any drinking he does is subsequent to work and not before or during his employment. There is no evidence of impairment due to chronic alcoholism in the objective medical record.

Record p. 10. The finding that the plaintiff is not disabled because ``there is no continuous reference to alcoholism" falls considerably short of the level of analysis the Administrative Law Judge is required to perform in this case. In fact, the evidence of record substantially contradicts the Administrative Law Judge's PRTF assessment.

In a case involving a mental disorder, the Secretary must assess the degree of functional loss in four areas: activities of daily living, social functioning, concentration, persistence or pace and deterioration or decompensation in work or work-like settings. 20 C.F.R. ' 416.920a. The evidence in this record reveals that the plaintiff lives a relatively restricted life. He depends in large part on his sister and a family friend for financial and emotional support. Record p. 32. He has no hobbies, does not participate in any social events, organizations or church, does not go to the movies, rarely goes ``visiting," occasionally talks on the phone -- usually after drinking -- and spends most of his time at home watching television. *Id.* at 33, 39-40.

The plaintiff has not been able to maintain employment. His last two jobs lasted only days. *Id.* at 24-25. He testified that he left jobs primarily due to his back pain, *id.* at 26, 34-35, but also indicated that he was troubled by scheduling problems, aggravated by working with the public and simply failed to show up for work one day without contacting his supervisor. *Id.* at 34, 36. He also testified that he ``always drank quite heavy" and that his pattern is to drink after work, but not during or before work. *Id.* at 35. He entered a detoxification facility in 1982 for 10 days without success. *Id.* at 37.

There is evidence in the record that the plaintiff's personality disorder causes him to focus on physical symptoms --such as back pain -- rather than on his alcoholism or mental impairments. Record at 150, 159. The record also contains several references to his alcoholism and associated personality disorder. Record p. 93 (discharge diagnosis indicating history of alcohol abuse); record p. 150 (``Other prominent features are depression, generalized anxiety and somatic concern. Typically, such patients are unwilling to accept that their physical symptoms are the result of emotional conflicts. There is often chronic adjustment pattern in which repression, denial somatization and a passive dependent orientation are utilized."); record p. 95 (diagnosis presented history of alcoholism).

Finally, Mary Susan Haynes, Ph.D., evaluated the plaintiff on December 6, 1989 and provided a comprehensive report, record pp. 155-60, which the Administrative Law Judge summarily dismissed as unreliable because her conclusions were ``based on what the claimant related to her as to his history of drinking." Record p. 10. Presumably, the Administrative Law Judge felt that a trained psychologist cannot interpret subjective statements within a clinical framework. He stated that ``[t]here is no evidence of impairment due to chronic alcoholism in the objective medical record." *Id.* Yet, Dr. Haynes administered the WAIS-R, WRAT-R, Bender Motor Gestalt and MMPI tests, all of which are -- arguably if not certainly -- considered objective measures of personality disorders. Dr. Haynes suggested that the plaintiff's personality disorder fits the profile of an alcoholic.

Dr. Haynes' evaluation is extensive and replete with references to objective indications of mental impairment related to alcoholism. There are suggestions of organic damage, inability to cope with everyday stress and responsibility, difficulty with employment, heavy dependence on others and somatization. *Id.* at 159. Dr. Haynes concluded that the plaintiff's profile ``is consistent with that of an alcoholic. In addition, these characteristics are present in combination with a passive-aggressive personality style which leads him to express hostility in an indirect way and to be uncomfortable with direct expressions of hostility." *Id.* at 160.

I find that the record is barren of any medical evidence contradicting Dr. Haynes' findings. In fact, her evaluation comports in large measure with other evidence of dysfunction noted in the record and discussed above. The Secretary is not at liberty simply to ignore uncontroverted medical reports. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986). He therefore erred in dismissing Dr. Haynes' report as unreliable.

The plaintiff next argues that, in addition to the Secretary's erroneous Step 3 analysis, the hypothetical questions posed to the vocational expert by the Administrative Law Judge failed to reflect

an accurate assessment of the medical evidence relating to the plaintiff's limitations. This becomes an issue at Step 5 of the sequential evaluation process wherein the Secretary may elicit the testimony of vocational experts to establish whether there is work in the national economy, other than the claimant's past relevant work, that the claimant can perform.

The First Circuit has stated that hypothetical questions must accurately reflect evidence in the record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). I do not find that to be the case here. In light of the fact that the Administrative Law Judge dismissed Dr. Haynes' report, it is not surprising that his questions to the vocational expert did not address the possible impact of any psychological limitations on the plaintiff's ability to work. Further, based on the narrow questions posed by the Administrative Law Judge as to the plaintiff's alcoholism, the vocational expert did not offer any opinion as to whether there were jobs available for someone with the plaintiff's alcoholic profile.

I find that the Secretary failed to properly evaluate this plaintiff's disability from alcoholism. In addition to erroneously discrediting Dr. Haynes' report, the Secretary's determination that the plaintiff's impairment from alcoholism does not meet the Listings because ``there is no continuous reference to alcoholism" in the medical record does not satisfy the procedural requirements of either *Arroyo* or the applicable regulations. Finally, even if the Secretary again reaches Step 5 upon reconsideration of this decision, the questions posed by the Administrative Law Judge must reflect the evidence of record and the vocational expert's testimony must support the Secretary's findings as to the plaintiff's ability to work.

For the foregoing reasons, I find that the Secretary's decision is not supported by substantial evidence and I recommend that it be ***VACATED*** and the cause ***REMANDED*** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of August, 1991.

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David M. Cohen
United States Magistrate Judge